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February 4, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: ET Docket No. 93-266*
Gen. Docket No. 90-314

Dear Mr. Caton:

Enclosed are an original and nine copies of a letter written to Mr. Andrew S. Fishel for inclusion in the record in each of the above-captioned proceedings.

Please direct any questions to the undersigned counsel.

Sincerely,


Laura H. Phillips

LHP:vcs
Enclosures

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February 4, 1994

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VIA HAND DELIVERY

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
1919 M Street, Room 852
Washington, D.C. 20554

Re: ET Docket 93-266;
Gen. Docket 90-314

Dear Mr. Fishel:

On January 26, 1994, Pacific Bell submitted a letter to you alleging violations of the Commission's ex parte rules by the three entities that received Pioneer Preferences: American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox") and Omnipoint. Cox, by its attorneys, hereby responds to the letter as it addresses Cox's actions.

The relationship of the Commission's ex parte rules to the Pioneer Preference rules is clear and unambiguous. At the time the preference rules were adopted the Commission considered the application of its ex parte rules to pioneer preference requests and preference awards.^{1/} The Commission expressly determined

1/ The Commission stated: "The petition for rule making, the request for a pioneer's preference, and any experimental license application will all be treated as separate proceedings, because of the differing ex parte requirements, although for convenience purposes they may be addressed by the Commission in a single document. Any experimental license application and the request for a pioneer's preference are adjudicative proceedings under our ex parte rules, see 47 CFR section 1.1202(d). Accordingly, upon the filing of a formal opposition, see 47 CFR section 1.1202(e), those
(continued...)

Mr. Andrew Fishel
February 4, 1994
Page 2

that ex parte contacts directed to the merits of a particular opposed preference proposal would be impermissible, but that no prohibited ex parte restriction should extend to related non-restricted rulemakings. The Commission established a set of parameters so as not to deprive the Commission of the generally acknowledged and publicly beneficial contacts with parties interested in the merits and outcome of a rule making proceeding that also involved a pioneer preference:

The restricted nature of a formally opposed request for pioneer's preference proceeding and any formally opposed experimental licensing proceeding would not limit ex parte presentations in the exempt petition for rule making proceeding on whether or not the proposed spectrum allocation is new and innovative and in the public interest. Ex parte presentations on who should or should not receive a pioneer's preference or experimental license would be prohibited, however. Pioneer Preference, 6 FCC Rcd at 3500, n.9.

Thus, when the Commission initiated a rule making in Personal Communications Service Docket No. 90-314, it was a non-restricted rule making. Cox documented its meetings with Commission staff by filing ex parte letters. Cox's involvement in Personal Communications Services ("PCS") dates from the Commission's earliest consideration of PCS in its Docket No. 90-314 Notice of Inquiry.^{2/} Cox consistently has supported the Commission's proposals to establish PCS as a service competitive to the telephone local exchange. Cox has demonstrated leadership and its success as a developer of cable-based PCS is a matter of record. Over the years Cox has filed extensive comments directed to the merits and the outcome of both the PCS rule making and its particular preference award. Cox has always, however, maintained a bright line between presentations to the Commission on non-restricted and restricted matters. Cox categorically denies any prohibited ex parte contacts were made by Cox or its representatives.

1/ (...continued)

matters will become 'restricted' proceedings in which ex parte presentations are prohibited. See 47 CFR section 1.1208(c). The petition for rule making to allocate spectrum will be an exempt proceeding under the ex parte rules, 47 CFR section 1.1204(a)(2)." Pioneer Preference, 6 FCC Rcd 3488, 3493 (1991).

2/ See Personal Communications Services, 5 FCC Rcd 3995 (1990) (Notice of Inquiry).

Mr. Andrew Fishel
February 4, 1994
Page 3

No Violation of Ex Parte Rules Occurred.

The allegations leveled at Cox are twofold. First, Pacific Bell claims that Cox's letter filed on September 28, 1993 did not contain sufficient proof of service, although Pacific Bell itself observes that copies were apparently sent to the parties in Gen. Docket 90-314.^{3/}

This allegation is devoid of merit. Cox's September 28 letter clearly provided on the signature page a list of parties served that included the Commissioners, Commission staff and the service list for Docket No. 90-314. The letter was filed with the Secretary's office on September 28 and copies are maintained in the Commission's public files. Pacific Bell seeks to raise an issue where absolutely none exists. Cox reaffirms its service of the September 28, 1993 letter.

In its second allegation, Pacific Bell asserts that Cox filed ex parte letters in ET Docket No. 93-266 in early November 1993 that indicate that Cox's representatives discussed "outstanding issues in the Commission's Pioneer Preference (sic)^{4/} Proceeding" with Commission personnel. Pacific Bell claims that, because Cox had not yet filed comments in ET Docket No. 93-266, those letters were not sufficiently informative of Cox's position on the main issue in Docket No. 93-266, the continuation or modification of the Commission's pioneer preference rules and policy.^{5/}

Pacific Bell acknowledges the "close nexus" between Docket Nos. 90-314 and 93-266 and generally restates the Commission's ex parte requirements that "[p]arties making ex parte contacts must list the subjects discussed and arguments presented to the extent they are not reflected in the party's previous written filings." While Pacific Bell

3/ See Pacific Bell letter at 2 fn. 4.

4/ Cox's ex parte letters actually said that it "discussed issues in the Commission's Pioneer Preference Notice Proceeding." (emphasis added)

5/ Pacific Bell claims that, since Cox had not filed comments in ET Docket 93-266, its position could not have been reflected in Cox's "previous" written filings. Further, Pacific Bell observes that "the letters offer no insight as to what 'arguments or data' were presented to support Cox's 'position'. Nor do they indicate what Cox's position was." Pacific Bell letter at 3-4.

Mr. Andrew Fishel

February 4, 1994

Page 4

admits that ET Docket No. 93-266 is a non-restricted proceeding,^{6/} it implies that any Cox presentation to the Commission staff must have involved the merits of individual pioneer preference applications. In fact, Cox's meetings with Commission staff were entirely consistent with the Commission's ex parte rules.^{7/}

It should require no great insight to infer from Cox's status as a tentative pioneer preference holder and its previous filings in related Docket No. 90-314 that Cox

6/ With regard to fn. 5 of PacBell's letter, there is nothing "ambiguous" about the Commission's Notice of Proposed Rulemaking in ET Docket No. 93-266. The Commission's statement that "many pioneer preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted . . .," plainly means no ex parte presentations would be permitted concerning the pioneer preference requests and oppositions. Pacific Bells's strained interpretation of the Commission's reference to "these proceedings" (i.e. that the entire Docket No. 93-266 proceeding is transformed into a restricted ex parte proceeding), would remove all meaning from the Commission's totally unambiguous statement that ET Docket No. 93-266 is a "non-restricted notice and comment rule making proceeding."

7/ The Notice was a non-restricted rule making in every aspect save one. The Notice stated:

We note . . . that many pioneer preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court. Pioneer Preference Notice, 8 FCC Rcd 7692, 7695 (1993).

Every other aspect of the pioneer preference review, including whether any changes to the preference rules should affect the tentative preference holders, was non-restricted subject matter. Indeed, it was clear from Commission statements and the written record that the proceeding arose not from any misgivings regarding the merits of any particular preference request, but rather addressed the desirability of continuation of the preference policy generally and the effect of any rule changes to tentative preference designees.

Mr. Andrew Fishel
February 4, 1994
Page 5

avored continuation of the Commission's pioneer preference policies.^{8/} Further, it is disingenuous to suggest that Cox was not already on record supporting the continuation of the Commission's pioneer preference program. Cox's views on the public interest benefits of the Commission's preference policies were a matter of public record long before Cox's November meetings with Commission staff. Cox's later filed Comments and Reply Comments in ET Docket No. 93-266, and its November meetings with Commission personnel referred to in Pacific Bell's letter, merely reiterated the points made in Cox's previous written filings supporting continuation of the Commission's pioneer preference policy.

In a similar circumstance, the Commission recently ruled that two "Big LEO" applicants did not violate Commission *ex parte* rules by making oral presentations on a non-restricted rule making that addressed standards that would govern the industry as a whole, even though those presentations could have a dispositive effect on particular pending applications. The Commission's Acting General Counsel concluded:

We recognize that the resolution of these matters in the docketed proceedings will have an impact on the pending applications. This, however, is the case in any rulemaking proceeding relating to a service for which applications have already been filed. And, as recognized by the Commission in prior instances in which rulemakings were related to pending applications, this does not and should not render improper *ex parte* presentations regarding the policy issues raised in the rulemaking proceedings. We also believe that the general policy questions of spectrum, licensing and service rules for Big LEOs are clearly distinct from whether specific applications should be granted. Accordingly, we find that oral *ex parte* presentations by Motorola/Loral on the former set of issues were permissible under our rules.^{9/}

The Commission's Acting General Counsel correctly ruled in that case, and must in this, that no impermissible contact occurred and no Commission rules were violated.

8/ For example, in Docket No. 90-314, Cox filed comments on January 29, 1993 supporting the Commission's preference policy for service and technical innovation. See Comments at 2-4. Again in Reply Comments on March 1, 1993, Cox expressed support of the pioneer preference program. See Reply Comments at 4.

9/ Letter of Renee Licht, Acting General Counsel, to Robert A. Mazer, Jill Abeshouse Stern and Norman P. Leventhal, dated November 18, 1993 at 3-4 (citation omitted). A copy of the Commission's letter is attached.

Mr. Andrew Fishel
February 4, 1994
Page 6

Pacific Bell's Baseless Allegations Demonstrate Anti-Competitive Motives.

Cox's preference award is in Pacific Bell's wireline region. Pacific Bell has initiated an elaborate spin-off of its cellular licenses to become eligible under the Commission's present restrictions to bid for a 30 MHz license. Pacific Bell has successfully prosecuted a waiver request to ensure that its incomplete spin-off will not affect its eligibility to bid for a 30 MHz MTA license.^{10/} Award of a license to Cox apparently is troublesome to Pacific Bell because there will be one fewer license in the Los Angeles-San Diego MTA available through the auction process. The Commission, of course, anticipated this result at the time preference rules were adopted.^{11/}

If Pacific Bell is successful in its bid for a 30 MHz license, it will face competition from Cox and other PCS licensees to be licensed in the Los Angeles-San Diego MTA. Pacific Bell obviously is piqued to face the prospect of competition from a party granted a license pursuant to the Commission's pioneer preference policy. However, Pacific Bell did not complain when it received its set-aside of in-region cellular licenses under circumstances more favorable than those available to non-wireline cellular licensees. Pacific Bell's attempt to raise baseless allegations of ex parte impropriety in this circumstance is the height of market exclusion and anti-competitive behavior, and is utterly frivolous.

Finally, assuming that there were any merit to its claims, Pacific Bell has not demonstrated the required promptness in bringing its allegations to the attention of the Commission. Its allegations were submitted months after the actual filings complained of and on the eve of release of the Commission's order finalizing PCS preferences. Pacific Bell has not asked the Commission to take any action on its filing, presumably because it realizes that its unsupported assertions provide no basis for further action, which suggests that Pacific Bell merely seeks to intimidate rather than inform the Commission.

^{10/} See Request by Pacific Telesis Group and PacTel Corporation of a Waiver of Section 99.204, (PacTel Waiver Order), FCC 94-8, released January 18, 1994.

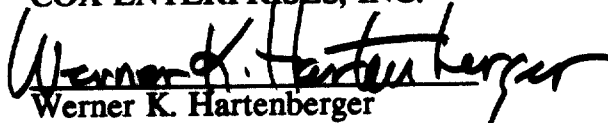
^{11/} See Report and Order, Establishment of Procedures to Provide a Preference, 6 FCC Rcd 3488, 3490-3492 (1991).

Mr. Andrew Fishel
February 4, 1994
Page 7

Pacific Bell obviously is disappointed that Cox was granted a pioneer preference in its wireline region.^{12/} The time to raise substantive challenges to its selection, however, is long past. In any event, Pacific Bell's baseless claim of ex parte improprieties is utterly without merit and should be dismissed.

Respectfully submitted,

COX ENTERPRISES, INC.


Werner K. Hartenberger
Laura H. Phillips

Its Attorneys

cc: Brian F. Fontes
Byron F. Marchant
Karen Brinkmann
Robert Pepper
Thomas Stanley
William Kennard

^{12/} Pacific Bell in fact criticized Cox's designation as a tentative preference holder. See Comments of Pacific Bell, Gen. Docket No. 90-314, January 29, 1993 at 14-16. Its opinions regarding the merits of Cox's activities have already been considered and rejected by the Commission.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

November 18, 1993

IN REPLY REFER TO:

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Dear Ms. Stern and Messrs. Mazer and Leventhal:

This responds to your letter dated October 14, 1993, on behalf of Constellation Communications, Inc., Ellipsat Corporation, and TRW, Inc. (hereinafter "petitioners"). You allege that Motorola Satellite Communications, Inc. ("Motorola") and/or Loral Qualcomm Satellite Services, Inc. ("Loral") violated the Commission's ex parte rules.

By way of background, your letter relates to three pending proceedings: (1) a rulemaking proceeding to allocate spectrum for low earth orbital satellite service (so-called "Big LEO" service) (ET Docket No. 92-28)¹; (2) a negotiated rulemaking proceeding that has been initiated preliminary to a rulemaking proceeding regarding licensing and service rules for Big LEO service (CC Docket No. 92-166)²; and (3) mutually exclusive applications for Big LEO

¹ See Notice of Proposed Rule Making and Tentative Decision in ET Docket No. 92-28 (Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites), 7 FCC Rcd 6414 (1992).

² See Public Notice "FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations," CC Docket No. 92-166, 7 FCC Rcd 5241 (1992).

service.³

You claim that Motorola/Loral violated the Commission's ex parte rules by making ex parte presentations to Commission decision-making personnel pertaining to their Jointly Filed Comments ("Joint Comments") filed October 7, 1993, in the docketed proceedings. Although ex parte presentations are not prohibited in those proceedings, you claim that the presentations were "inextricably entwined" with the merits or outcome of the application proceedings and, therefore, were prohibited under Section 1.1208 of the Commission's rules, 47 C.F.R. §1.1208, which applies to restricted, adjudicatory proceedings. You allege that the very same matters raised in these Joint Comments, e.g., spectrum efficiency standards and stringent financial qualification standards, were raised by Motorola in its pending "Consolidated Petitions to Dismiss and/or Deny" the applications of its competitors for authority to construct and operate Radio Determination Satellite Service ("RDSS")/Mobile Satellite Service ("MSS") stations. You allege that the oral ex parte presentations made to various Commission personnel address "matters which go to the very essence of the various license applications" and represent a "blatant effort to violate the Commission's ex parte rules and the fundamental due process protections underlying them." You also assert that both ET Docket No. 92-28 and CC Docket No. 92-166 involve "competing claims to a valuable privilege" and thus should be subject to a prohibition on ex parte presentations under Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959).

You request the initiation of hearing and/or show cause proceedings pursuant to section 1.1216(a) of the Commission's rules, 47 C.F.R. §1.1216(a), to determine whether Motorola and/or Loral should "be disqualified from further participation" in the above-mentioned proceedings or otherwise have their "claim or interest" in these matters dismissed. You also request that a public notice be issued indicating that all three pending proceedings are restricted under the ex parte rules. Responsive letters were filed by Motorola and you.

³ On April 24, 1991, satellite applications submitted by Motorola and Ellipsat Corporation ("Ellipsat") were accepted for filing and, on October 24, 1991, satellite applications submitted by AMCS Subsidiary Corporation, Constellation Communications, Inc., Ellipsat, Loral Cellular Systems, Corp., and TRW, Inc. were accepted for filing. See Public Notice "Satellite Applications Acceptable for Filing; Cut-off Established for Additional Applications," Report No. DS-1068, 6 FCC Rcd 2083 (1991) and Public Notice "Satellite Applications Acceptable for Filing," Report No. DS-1134, 6 FCC Rcd 6002 (1991).

For the reasons set forth below, we conclude that no impermissible ex parte presentations occurred. In addition, we do not believe it is necessary or appropriate to make either of the docketed Big Leo proceedings restricted under the ex parte rules.

The Commission has repeatedly stated that the mere pendency of a restricted adjudicatory proceeding, e.g., an application proceeding, does not preclude a party to that proceeding from submitting comments or otherwise participating in an informal rulemaking proceeding. See Report and Order in Gen. No. Docket 86-225, 2 FCC Rcd 3011, 3014 (1987) (a person is not prohibited in a non-restricted proceeding "from engaging in 'communications regarding 'general industry problems,' so long as they do not deal with the merits of the restricted proceeding.'") (quoting Report and Order in Gen. Docket No. 78-167, 78 FCC 2d 1384, 1397 n. 21, quoting in turn, Report and Order in Docket No. 15381, 1 FCC 2d 49, 56-58 (1965)). Thus, a person is free "to pursue other legitimate interests before the Commission" provided that the pendency of these other matters is not used by that person "as a pretext for ex parte communications going to the merits or outcome of a restricted proceeding." Id.

The subjects raised in the Joint Comments -- spectrum efficiency, bi-directional transmissions, coverage, and financial qualification standards -- do not address the merits of specific or individual applications and, therefore, are properly categorized as addressing "general industry problems," e.g., the amount of spectrum that should be allotted for this new service, the technical and financial standards that should govern the industry as a whole.⁴ They are not directed at the merits of the individual applicants, such as Motorola, Constellation, or Ellipsat, but rather to the applicants as a class.

We recognize that the resolution of these matters in the docketed proceedings will have an impact on the pending applications. This, however, is the case in any rulemaking proceeding relating to a service for which applications have already been filed. And, as recognized by the Commission in prior instances in which rulemakings were related to pending applications, this does not and should not render improper ex parte presentations regarding the policy issues raised in the rulemaking proceedings.⁶ We also

⁴ For example, bi-directional use of the frequencies 1610-1626.5 MHz, which you argue relates to the pending applications, is one of the subjects explicitly raised by the Commission in ET Docket No. 92-28. See 7 FCC Rcd at 6418.

⁶ See, e.g., Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and To Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for

believe that the general policy questions of spectrum, licensing and service rules for Big LEOs are clearly distinct from whether

specific, applications should be granted. Accordingly, we find that oral ex parte presentations by Motorola/Loral on the former set of issues were permissible under our rules.

For similiar reasons, we find that the docketed proceedings do not involve conflicting claims to a valuable privilege requiring a further prohibition on ex parte presentations under Sangamon Valley. Indeed, under our current rules, Sangamon-type proceedings are generally limited to allotment proceedings involving FM and television channels. See 47 C.F.R. §1.1208(c)(2); Notice of Proposed Rulemaking in Docket 86-225, para. 53, 51 Fed. Reg. 26,278 (July 22, 1986). Further, to ensure that the public is aware of what ex parte rules to follow, we state at the outset of rulemakings what ex parte rules apply. See id. We clearly stated that the rulemaking proceedings in Docket No. 92-28 would be subject to procedures for non-restricted proceedings and, consistent with the policy reflected in our rules regarding Sangamon-type proceedings, we see no reason to alter that determination.

Sincerely,



Renée Licht
Acting General Counsel

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the Provision of Various Common Carrier Services (Tentative Decision), 6 FCC Rcd 4900, 4916 (1991) and Inquiry into the Development of Regulatory Policy in regard to Direct Broadcast Satellites (Notice of Proposed Policy Statement and Rulemaking), 86 FCC 2d 719, 754 (1981).

CERTIFICATE OF SERVICE

I, Carole Walsh, hereby certify that today on this 4th day of February, 1994, I caused a copy of the letter of Cox Enterprises, Inc. regarding ET Docket 93-266 and Gen. Docket 90-314 to be served by hand delivery or first-class mail, postage prepaid to the following:

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